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FEBRUARY 23. 1793.

MIN. ALEX. MACKENZIE, W. S.

IN ANSWER TO THE
MIN. YORK-BUILDINGS Co.

MINUTES

FOR

ALEXANDER MACKENZIE, Writer to the Signet;

IN ANSWER TO THE

MINUTES for the GOVERNOR and COMPANY of UNDERTAKERS for raising Thames Water in York-buildings, against HIM.

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And. Steuart, jun. W. S. Agent.

C. Clk.

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IN ANSWER TO THE

MINUTES for the GOVERNOR and COMPANY of UNDERTAKERS for raising Thames Water in York-buildings, against HIM.

GEORGE FERGUSON, for ALEXANDER MACKENZIE, defender, answered, That from the beginning of this cause, to the present late stage of it, the pursuers had uniformly endeavoured to evade the fair discussion of the question at issue; their several papers had heaped misrepresentation upon misrepresentation, till, by the mass of writing which loaded the table of the Court, the true state, both of the fact and argument, seemed to be almost buried, and a new case, the offspring of the pursuers own imagination, was held forth as that upon which the Court

Court were to decide. The answers to the defender's reclaiming petition, contained, as usual, several gross misstatements, which had been detected in the defender's answers to the petitory part of that paper ; and it might have been expected, that the pursuers would have availed themselves of the opportunity afforded them by the minute, which is now to be answered, to have attempted a justification of these misrepresentations, or, finding that impossible, to have apologised for them to the Court and the defender. But so far from doing so, the pursuers have taken upon them to say, that your Lordships were *unanimous* in thinking that the defender's conduct had been at least improper ; and it is insinuated, that you were *almost* unanimous in thinking that the impropriety amounted to the strict charge of positive fraud. The defender will not imitate this example, or presume to repeat what he conceives to have been the opinion of particular Judges. But whether the above averments were meant to hurt him in the estimation of the public, or to produce their effect in another Court, the defender is entitled to say that they are equally reprehensible, having no other foundation than in the imagination of the pursuers themselves.

The pursuers set forth, that the counsel for the defender, in answering the petitory part of their answers, made his paper in fact a reply, and wandered from his duty, when he obviated the argument maintained by the pursuers, that if they were founded in a claim of damages against the defender, it followed of necessity that the sale ought to be reduced. They say, that this argument ' had as little to do with the petitory part of their answers, ' as any question upon a doubtful point of feudal law, or the validity of a freehold-qualification.' The defender submits, that this accusation is completely groundless, and that his counsel adhered strictly to his duty in all respects when he prepared the answers, and had no view of obtaining an advantage to which he was not entitled, though the conduct of the pursuers would have justified his entertaining a wish of having the last word, as a check on their misrepresentation. The petitory part of the pursuers answers included a prayer, to find the alleged impropriety of the defender's conduct sufficient *per se* to reduce the sale. The defender was therefore necessarily led to show in his answers, that his conduct had been in no respect improper, and he was equally well entitled to prove, by fair argument, that the charge of improper conduct on his part, was not only utterly false, but also completely irrelevant to infer a reduction of the sale. It therefore fell naturally to the defender

defender to show the absurdity of the argument alluded to, which he will still take the liberty to say, was supported, not by fair argument, but by 'scholastic subtleties, founded on evident misrepresentations.'

This argument is now again taken up, and the pursuers endeavour to overturn the grounds on which the defender shewed it to be absurd. It is said, that the defender argued his case 'by dividing and subdividing the whole charge into separate points and articles; by endeavouring to show, that each, standing by itself, was insufficient, and that the conclusion inferred could not therefore follow, though, taking the whole facts and circumstances together, and looking to the general complexion of the case, there may not be a doubt as to the conviction.' This notion the defender cannot help regarding as new and extraordinary. It may have been held out by the counsel who draws the minute, in the other Court to which he alludes, (and to which the pursuers seem to be very fond of pointing their allusions); but the defender must be forgiven for thinking, that there never was doctrine worse founded. The question is, Whether the mind can decide more clearly, justly and impartially, when it weighs separately and discriminately the various reasons and considerations held forth, or when it compresses the whole into one mass. The latter plan would indeed give the *general complexion* of the cause, that is to say, a general, confused and complicated idea of it, while the former can alone give a clear and distinct view, on which the judgment can rest secure. It has accordingly been an incessant struggle between the parties in this cause, whether the pursuers should succeed in their endeavours to involve, or the defender in his attempts to unravel it. The present minute appears to be an instance, and the passage now quoted is an avowal of the plan of the pursuers. But the defender hopes ultimately to succeed in defeating their object.

The defender does most certainly insist on the three points mentioned by the pursuers, and means humbly to contend, that they completely destroy the sophistical argument which they were intended to obviate. Min. p. 4.

The *first* is, That there was no fraud in the defender's conduct. The pursuers say, that it was a mistake in the defender's counsel to suppose that this matter was at rest, as they mean to insist for a special judgment upon that point. The pursuers have, at some periods of the cause, been forced reluctantly to admit, that this
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severe charge was not well founded. Particularly, in their reclaiming petition against the first interlocutor of your Lordships, they say, 'The petitioners beg leave to assure your Lordships, that as they never were actuated by any hostile motive to Mr Mackenzie, so they never endeavoured to criminate that gentleman more than was considered to be necessary in order to recover their right. Now they are still less than ever disposed to attack his character, because they are humbly confident of being able to satisfy your Lordships, *without impeaching it*, that the sale in question ought to be reduced.' The defender supposes, from the attack being now renewed, that his reclaiming petition has taught them to be less confident than they were upon the question, independent of fraud. But be that as it may, he most cheerfully concurs with them in desiring a special judgment of the Court on this point, and awaits that judgment with firm, though humble confidence.

2dly, The defender contended, that there was not in his conduct any thing improper, nor any thing like what the pursuers call constructive fraud. The pursuers, however, now again attempt to persuade your Lordships that there was. But neither here, nor even in their long answers, is there stated any particular facts, or chain of circumstances, sufficient to infer, far less prove, fraud or impropriety of any kind. They confine themselves entirely to an artificial argument, which proceeds upon this, that if there was any thing omitted to which the defender should have attended, it is impossible, that the omission could be other than wilful, that is, fraudulent, since the defender was at the time acting as purchaser, and 'simplicity and cunning cannot be predicated of the same person, as existing in the same instant of time, and in the same individual transaction.'

The defender opposed to this *deep reasoning*, that as seller, (for he waved in this question all dispute, whether he was in the eye of law, seller or not,) he conducted himself with all the diligence of which he was capable, and omitted nothing to which it was his duty to attend; that as buyer, on the other hand, he did nothing but rose up and offered at the sale.

What answer have the pursuers made to this? They say, that *as seller*, he omitted to stop the alleged precipitancy of the macer. The defender refers to his answer for a complete refutation of this charge. The defender might here rest the matter, so confident is he that your Lordships will be satisfied, that his not taking the step alluded to, was no omission of any duty whatever. But as the pursuers
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not only insist, that there was an omission, but also that, by the defender's attention to his interest as purchaser, it must be construed to have been wilful, the next question in judging this supposed constructive fraud is, What was the consummate prudence *as buyer*, which is supposed to prove the alleged omission to have been wilful? The defender in vain searches for it in the minute. No act of prudence as buyer is condescended on; but in place of such it is said, 'His *duty* as buyer lay the opposite way; he had a *right*, as Tweedie did half an hour after, to dispute his own power, as agent, of doing so; and to insist, that in law and justice, the purchase was his, whatever consequences might arise to the creditors or common debtor.' The circumstance alluded to, appears from his deposition to be, that after Tweedie had, as he conceived, been declared purchaser of a lot, an objection was made by some person to his responsibility, and that further offers being made, he was outbid. The utmost, therefore, that follows from what is here said by the pursuers is, that if circumstances similar to those supposed by Tweedie to have happened in his own case, had existed in the defender's, that is to say, if after the lots of Seaton had been knocked off to the defender, an objection had, in open Court, been made to his purchase, and if it had been demanded, that they should be again exposed to sale, in such a situation the defender would have had a right, as buyer, to insist on the validity of his purchase. In other words, the pursuers say, that a case *might have existed, or may be conceived*, in which the duty and the interest of the common agent might interfere, and in which, on the supposition of his failing in his duty, the failure might be ascribed to his allowing interested motives to preponderate. It is enough for the defender to say, that the circumstances assumed *did not exist* in his case; that no objection was made to his purchase on the night of the sale, nor was any hint communicated, much less a demand made for a re-exposure of the lots which he had bought. He therefore submits, that the pursuers have been unable to shew, either that there was any omission of duty *as seller*, or that there was any diligen^tia, any prudence *as buyer*, upon which to found their construction of fraud; and that, except offering at the sale, 'he did nothing else, he did not utter another syllable, and took no step, either direct or indirect, to render his offer effectual, and to prevent the interference of competitors.'

This idea of constructive fraud is altogether destroyed by the very circumstance of pretended omission, and the single one on which the

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pursuers

State, p. 104.

pursuers endeavour to rear it, (and in this view the defender regards it as a fortunate event, that it occurred, and he trusts that it will appear to your Lordships in the same point of view); for surely there can be no better test of his purity, than the proposition made to him by Mr Taylor to stop the macer. Had he been inclined to hurry over the sale, so as to prevent competition, he would have answered by remarking, (what was clearly the opinion of the most respectable men of business present), that there was no unusual hurry. But, on the contrary, though fully impressed with that idea, he acquiesced at once in Mr Taylor's desire, and wishing to avoid all appearance of ostentation, left the matter to his management.

3dly, The defender maintained, (in order to point out the fallacy of the reverse argument on the part of the pursuers,) that the same principles which might have led to the conclusion of damages, upon account of omission, exclusive of the supposition of fraud direct or constructive on the part of the defender, (had the pursuers been able to establish such omission), could not also lead to the conclusion, that the sale ought to be reduced. The defender contended, and still contends, that the doctrine of the pursuers upon this point has no foundation whatever; and that, were it admitted as law, it would overthrow the just and obvious distinction between grounds of challenge on the head of fraud, of *culpa levis*, and of *culpa levissima*, which have hitherto been held to be in their consequences widely remote from one another. The defender need not now repeat those arguments which are very ably stated in his answers, and which he is convinced must have satisfied your Lordships, that this plea of the pursuers is subversive of all principles of justice, and has no support from the law of this country. He shall only observe, that the pursuers in their minute endeavour again to confuse the argument, by referring to cases where fraud is one ingredient, though from the shape of the question, all ideas of fraud must be entirely excluded, as parties are agreed on the relevancy of that plea. Of this description are the cases (quoted from Lord Kames's Principles of Equity,) of goods stolen, or a disposition procured by force or fear. The case of stellionate involves not only a direct fraud, but the participation of a crime punishable by statute. The case of Campbell against More, is also one which was determined by the Court upon the ground of fraud; and although Lord Kames observes, that the wrong in that case was not, properly speaking, fraud, yet he gives it the name of a *transgression of fair dealing*, which, if it be not nearly the same thing with fraud, is at least a sort of conduct which

which can bear no analogy to the hypothesis under consideration, namely, that of an omission of duty, arising from no fraud direct or constructive. To shew that there can be no connection, such as the pursuers endeavour to establish, it is sufficient to say, that the case of Campbell is introduced by Lord Kames, as an example of *indirect means* used by persons *who are swayed by interest more than by conscience, to evade performance of their engagements*. This is precisely the constructive fraud which the pursuers have, with how little success it is left to your Lordships to judge, endeavoured to make out in the conduct of the defender.

N. B. It will be observed, that the pursuers quote from the 1st, and the defender from the 2d edition of Lord Kames's Principles of Equity.

The author above alluded to, in his preliminary discourse, points out the two ends of reparation, *viz.* the repressing wrongs that are not criminal, and the making up what loss is sustained by wrongs of whatever kind; and he says, 'In every case where the mischief done can be estimated by a pecuniary compensation, the two ends of reparation coincide. The sum is taken from the one, as a sort of punishment for his fault, and is bestowed on the other, to relieve him from the loss he has sustained.' It cannot be disputed, that were it possible for the pursuers to prove what has been uniformly denied, that the defender had omitted any part of his duty at the sale in question, the loss thereby sustained, could be estimated in money, and that every end of reparation would be answered by awarding damages. But the defender will go farther; for he insists, that a reduction of his purchase would go very far beyond the ends of reparation; it would not be restoring the party supposed to be injured to their former situation, it would be placing them in a much better situation, inasmuch as, by circumstances often mentioned and well understood, the value of land-estates has been prodigiously increased since the purchase was made, and since the time when the property behoved at any rate to have been sold; and it would be inflicting a severe punishment upon the defender, in as far as the value of money has, by the same circumstances, been in the same proportion diminished. Yet it is clear, (and so Lord Kames lays it down,) that punishment cannot be inflicted for a wrong that is culpable only, and not criminal. This affords a complete answer to the argument drawn from the opinions of Lord Stair and Mr Erskine.

The pursuers conclude upon this subject, 'by maintaining it as a sound legal proposition, that if any impropriety of conduct, or any legal wrong, or any transgression of fair dealing, sufficient to infer a claim of damages against the defender, was in this case admitted, though short of either positive or constructive fraud, the necessary and inevitable result was, that the pursuers

' pursuers were entitled to a judgment of their Lordships, ' reducing and setting aside the sale *in totum*.' The defender, far from admitting, has uniformly denied, that there was in his conduct any impropriety, or any legal wrong, or any transgression of fair dealing, or that there can lie against him a claim at the instance of the pursuers for one shilling, upon any ground whatever. He has condescended to argue with the pursuers upon their own hypothesis; but while he contends, as he has done, that that hypothesis is totally irrelevant in law to infer a reduction of his purchase, he, at the same time, requests it may be remembered, that he still, as he has done upon all former occasions positively insists, that it is as inconsistent with the state of the fact as with sound principles of law.

The minute for the pursuers concludes with a statement of certain cases which have occurred in England, and of which the principles are represented as similar to those which ought to regulate the decision of this question. These cases are said by the pursuers to be stated *in terms of the desire of the Court*. Whether such desire was intimated by the Court, your Lordships are best able to judge; the defender can only say, that the utmost attention which he could pay to the proceedings in Court, when the pursuers were allowed to give in their minute, stating English cases in consequence of their own application at the bar, did not inform him that you entertained any desire or wish upon the subject.

The defender must take the liberty of saying, that in every step of the present process, the pursuers have given, and in the minute now to be answered take for granted, a specious, but false and mistaken view of the cause before your Lordships; and though this phantom, created by the pursuers themselves, may have some resemblance to the cases which are quoted, which the defender does not mean to take the trouble of considering, yet they essentially differ from the real cause upon which your Lordships are to decide in material circumstances. To shew that the defender is not going one step beyond what he is justified in saying, it is necessary for him to recal to the remembrance of your Lordships the leading circumstances of his case, which, owing to the plan followed by the pursuers, are in danger of being lost and forgotten, or at least obscured and laid out of view. This he shall do as concisely as possible; after which a very few words will suffice to prove the wide distance between the principles on which
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the cases quoted were determined, and those which ought to decide the present question.

The lands purchased by the defender were judicially sold before your Lordships, and the defender was common agent, and as such conducted the sale.

The roup was intimated to the public by very frequent and anxious advertisements, holding out the value of the estates in the most attractive point of view. The rentals of the lands were proved with the greatest care and attention, under the advice of some of the highest characters in this country, for probity and knowledge. The values or upset prices were fixed by the oaths of two respectable gentlemen, (one of them Sheriff of the county in which the lands lay); and the opinions of those gentlemen were formed, not at random, but on an intimate acquaintance with the lands, and an accurate examination of the proven rentals: And it appears from the deposition of Mr Law, that he entertained some doubt whether he had not overvalued the estate, as he depones, That he went to the sale for the purpose of learning, 'whether the estate sold at, below, or above his estimation.' The good qualities of the property under sale were not only publicly advertised; but it is in evidence, that the defender did more than in bare duty he was called upon to do, by earnestly recommending the whole Winton estate, and particularly one of the lots afterwards purchased by himself, as advantageous purchases, to more than one of his clients. In short, the defender does not only assume it as an undeniable proposition, that he was guilty of no fraud in preparing the sale, but he conceives himself entitled to affirm, that every thing was conducted with a degree of care and anxiety which is not commonly to be met with. State, p. 171. E.

On the 15th of February 1779, the sale came on at the time advertised; an extraordinary crowd of company was convened; all the preliminary forms were gone through, and the defender having come forward in person, and made his offers in open Court, for his own behoof, was declared purchaser of the 1st and 2d lots of the lordship of Seaton, at the upset prices. He considered the price which he paid to be a fair and equal one, according to the value of land at the time; and though this point has been disputed by the pursuers, on grounds which he trusts are completely refuted, he conceives, that it is fully and unquestionably established by this striking circumstance, independent of all others, that though he was persuaded to offer for the remaining lot of the same lordship, which encroaches somewhat on the two he had bought, he could not be prevailed upon, even in these circumstances, which were strongly
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Pet. p. 52. to
p. 62. inclusive.
Ans. p. 18. to
36. inclusive.

urged by Mr Taylor, to offer for the 3d lot more than the sum of L. 675 above the upset price. On the whole, he does humbly contend, that the pursuers have completely failed in their attempts to prove any impropriety in his conduct upon that occasion. On the contrary, he trusts your Lordships will be satisfied, that it is impossible to accuse him of any error, either of omission or commission, on the evening of the sale. These propositions are very ably maintained in the defender's reclaiming petition, and in the answers which he lately gave in to the petitory part of the answers for the pursuers.

On the 22d of June 1779 the sale was reported to the Court; no objection was stated from any quarter, and your Lordships found the sale legally and orderly proceeded. The defender entered into possession, let leases of the lands, erected farm-houses, built a dwelling-house, and laid out considerable sums in otherwise meliorating the estate. He paid the price which he had offered, in consequence of warrants of your Lordships in favour of preferable creditors, who, according to the uniform practice, granted him conveyances of their respective debts, and of the lands purchased by him, over which they were heritably secured, thereby ratifying his purchase, and granting him absolute warrandice to the extent of the sums which they received. It was not till the year 1784 that any challenge was brought. The defender immediately stepped forward to meet the attack, but the pursuers thought proper to decline the contest; and from this circumstance, as well as the nature of the attack made, the defender had every reason to be satisfied, that it was meant merely to defame his character, and thereby gratify the malice of the then Governor of the Company, and also with the view of depriving him of the office of common agent in the ranking, which that gentleman had much at heart, and not for the purpose of instituting any serious question of the validity of his right. Thus matters remained till the year 1790, when the summons was raised, upon which the present proceedings are founded.

The defender has thus given your Lordships a fair and candid view of the prominent features of his cause; and it will be no difficult task to shew the many discrepancies which exist between it and the English cases referred to. But before proceeding to take notice of the particular circumstances of these cases, the defender requests the attention of your Lordships to the following observations.

It

1st, It is dangerous, from the mere authority of book cases, which are liable to be misunderstood, to infer general principles applicable to the law of this country, and, particularly, in points so peculiarly municipal as what respects the nature and effect of a *judicial sale*.

2^{dly}, It is material to advert to the very great distinction between a sale by public roup, and a sale by private bargain. Where great confidence is reposed, it may be possible, in a transaction by private bargain, to abuse that confidence, and turn it against the person who reposes it, and yet it may be very difficult to detect the abuse. In a sale by public roup, on the contrary, there is in truth no confidence reposed; and it is impossible to conceive a fraud to be committed without immediate discovery. This distinction is clearly marked out in our law; and the consequence flowing from it is, that at a public roup every person whatever is free to offer, and it is justly considered, that every additional offerer gives a chance of raising the value of the subject. There is but one exception from this general rule, namely, that it is not understood to be lawful for the owner himself, or any person acting for him, to bid at a public voluntary sale; because, as it is clear that he does not wish to keep the subject to himself, his offers are unfair, as they tend to raise the price above the actual value, as appearing from a just competition; and because, as the owner may expose his subject at what he considers to be its utmost value, it is no hardship, that he should be prohibited from being an offerer.

3^{dly}, There is still another distinction to be attended to, which is clearly founded in our law, between a public voluntary sale and a judicial sale, whether at the instance of creditors, or of an apparent heir, under the act 1695. This distinction arises naturally from the peculiar qualities of a judicial sale, which render it morally impossible, that a common agent can without detection be guilty of malversation in his office. The most minute circumstances of the rental and value of the estate come under the observation of the Supreme Court, and any point of difficulty occurring, is decided by a solemn judgment of the whole Lords. The proceedings at the roup are superintended by one of the Judges in person, and, in general, the whole steps of procedure, previous and posterior to, as well as at the time of the sale, are attentively observed, not only by your Lordships, in your collective or representative capacities, but also by the agents for the respective creditors, whose interests
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are deeply at stake, by the agents for intending offerers, by the clerks and officers of Court, and, in general, by almost every member of the College of Justice, to the inspection of every one of whom the whole proceedings are necessarily open, and very many of whom are induced, by various and numberless motives, to make use of the opportunity. The consequence flowing from this distinction is, that every person whatever, *even the owner himself*, is permitted to become purchaser at a judicial sale, though a purchase by the owner himself at a public *voluntary* sale is adverse to the most established principles of our law. The permission allowed to the owner himself to offer, is also justly founded on this, that by the proof of the bankruptcy, he is divested of his title to the estate under sale, the property of which is transferred to your Lordships, as trustees appointed by the acts of Parliament made in that behalf.

Lastly, It is proper to advert to the very great difference between the situations of a trustee and a common agent, which must evince, that no inference could be drawn from the case of a trustee, to that of a common agent. The employment of a common agent is merely that of an officer of Court, acting under the authority of your Lordships in ascertaining the debts of the bankrupt, and stating all legal objections to the claims of the creditors, in proving the value of the estate, according to the fixed rules of business, in causing it to be exposed to sale, and the price to be divided among the several creditors, in such a manner as the priority and regularity of their respective diligences renders just. Such appears to be the affirmative description of the office of a common agent. On the other hand, to describe it negatively, it has been shown, that a common agent is not agent for the bankrupt, whose estate is sold:— That he is not in the sense of law the seller of the estate;—and that he is not trustee for the creditors,—and much less for the bankrupt.

Pet. for Defendant,
p. 30.
— p. 32.
— p. 33.

But though, from the observations premised, there is great delicacy in applying English cases to that now before your Lordships; yet, since these have been obtruded upon him, and as his counsel here are not versant in the law of England, he has thought it proper to apply to those who are, and is now to speak in the words of a learned gentleman, who, he is well assured, understands the subject upon which he treats, as he believes will appear from the manner in which he treats it.

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' The situations in English practice, most resembling that of a
' common agent in Scotland, are those of a solicitor in a cause
' in Chancery, and of the attorney to assignees, under a commission
' of bankrupt.

' I never, till this case was laid before me, heard a suggestion,
' that either of these persons were incapacitated by their situation,
' from purchasing lots sold before the Master in the one case, or
' the Commissioners of bankrupt in the other.

' The cases cited certainly do not prove it; and if applied to
' prove it, must, in my apprehension, be misunderstood.

' The first case of *Whelpdale v. Cookson*, in 1. Vezey. 9. is esta-
' blished law, and proves, that a trustee cannot, even by auction,
' sell to himself. But the two cases are extremely different. A tru-
' stee who has the entire management of the estate, as in that case,
' is absolute master of all the arrangements for the disposition of it.
' He determines when it shall be sold, and where. He publishes
' the conditions of sale, and the description of the estate, and is in
' the whole conduct of the business without controul; whereas, in
' judicial sales, every thing is done under the sanction of the pu-
' blic officer. In Chancery, the Master settles the particulars, di-
' rects the advertisements, fixes the time, and ascertains the pur-
' chaser. It is the same thing before the Commissioners of bank-
' rupt; their situations are entirely different from that of a trustee,
' and the existence of the rule in one case, is no evidence of its
' existence in the other.

' *Twining v. Morrice*. This case turned upon the particular cir-
' cumstances. The Court thought upon the evidence, that in con-
' sequence of Blake bidding, the sale had been actually checked, or
' that the sellers had been induced by those means to let it
' go for less than they would otherwise have done. For the two
' trustees, the sellers swore, that they imagined Blake was bidding
' for them; and the Court refused, *upon the footing of the actual in-*
' *jury done*, to carry the contract into execution, and not upon any
' general notion, that Blake's situation disabled him from purcha-
' sing; and it is to be observed, that even this turned upon the na-
' ture of the jurisdiction courts of equity exercise respecting spe-
' cific performance, which they hold to be entirely in their dis-
' cretion. For there was a cross cause brought by the tru-
' stees to have the contract cancelled, which the Court also dis-
' missed, and left the parties to their remedies at law; so that if
' the contract had been executed by *legal* conveyances having been

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' made of the land, the bargain must have stood upon the very
' principles established in the case.

' Crowe v. Ballard, is a case of quite a different kind. The
' bargain was inadequate. It was a young man dealing for an ex-
' pectancy, and there was a direct fraud practised upon him. These
' are all distinct and established heads of equity, each of which
' standing alone would have been sufficient to support the decree.
' As to the phrase stated by the reporter to have been used by the
' Court, no inference is to be drawn from it. It must be taken as
' applied to the particular circumstances of the case. It is natural
' enough for gentlemen at a distance to rely upon general expres-
' sions put into the mouth of the Court, but they will be constant-
' ly misled if they do so; for these reports are extremely inac-
' curate.

' I do not believe that there is any case in point upon the sub-
' ject, and the reason is, that the doubt has never been raised. It
' is unquestionably the general sense of the profession, that solici-
' tors are under no such disability. There was a case determined
' lately at the rolls, which shows this in the clearest light. The
' name of it is Price v. Burgh. One Wild was *solicitor in a cause*
' *in Chancery*, was a *receiver of the rents appointed by the Court*,
' and was also *trustee of the property*. There was a sale before
' the Master, and this man, *invested with these three characters*,
' became a purchaser. Afterwards, the suit I have mentioned,
' Price v. Burgh, was instituted against him, in order to set aside
' the bargain, suggesting principally gross inadequacy of the price
' as evidence of fraud practised by him in the purchase. It was
' much debated upon that point, but the present Master of the
' Rolls, thinking that the plaintiffs had not made out the fact of in-
' adequacy, dismissed their bill. There would have been no occa-
' sion to resort to evidence of specific fraud, if the very character
' either of trustee or solicitor, rendered a man incapable of pur-
' c hasing at a judicial sale.

' There being here a total want of printed authority, I thought
' it fit to enquire of the experienced practisers, and the general
' sense certainly is, that there is no such disability. Sir John Mit-
' ford, the present Solicitor General, whose knowledge of the law,
' and business of the Court of Chancery, is at least as great as that
' of any man in it, and whose authority is as high, told me, that
' he was ignorant of any such disability, and suggested to me the
' case of Price v. Burgh, as evidence of the contrary. He, I be-
' lieve,

'lieve, was counsel in it. I have conversed with other gentlemen, who were also of counsel in it, and they all agree, that as to this point, it was as I have stated above.

' Since writing the above, I have had the minutes for the York-buildings Company sent me.

' I have had occasion to see the record in the case of *Whelpdale v. Cookson*. It was a case of sale by auction, and is certainly law.

' The only additional English case that I see cited, is that of *Bovey v. Smith in Vernon*. It seems to me to be totally misunderstood. If it prove any thing upon the subject, it is against the argument which it is used to support. For the ultimate decision is in favour of the trustee. Lord North changed his opinion, and decreed it for him. The trustee was the defendant, and the bill was dismissed, 1. *Vernon* 150. But in truth it has nothing to do with it. The circumstance of the trustee repurchasing the land was no ingredient in the argument, in so far as the question was, Whether he should be liable or no? and was only material, in so far as it enabled the Court to do exact justice, by restoring the very land, provided they should hold him to be liable at all. But if he had not repurchased the land, the question upon his liability would have been the same. A trustee must make compensation for a breach of trust. So far was clear. The question was, Whether, as he meant honestly, and was only mistaken, as the plaintiff himself was mistaken too, and privy to the transaction, the trustee should be liable at all? As far as there was any argument upon the trust affecting the land, it would have been exactly the same, if any *stranger* had purchased with notice of the trust.

' I have remarked an observation in the minutes, upon the expression stated in the case of *Twining v. Morrice*, to have been used by the counsel for the defendant in the first cause. What counsel say *arguendo* is but very slight authority, and in this book it is diminished by the probability that the argument is not truly represented. It is quite impossible that the counsel could state as a general proposition, what is there imputed to them.

' The case of *Fox and Mackreth* is also cited. It would be too long to go through it. It was long agitated in our Courts, and is perfectly understood.—Lord Thurlow hesitated much before he affirmed the decree of the Master of the Rolls. It did not turn upon any general incapacity, but upon particular fraud practised.

' The

‘ The Chancellor thought that Mr Fox had been defrauded. There
 ‘ is no doubt but a trustee may purchase from a *cestui que trust*, if he
 ‘ purchase fairly ; but he must not use the knowledge he has ac-
 ‘ quired, by means of being a trustee, to *cheat* his *cestui que trust*.
 ‘ Even in that report, annexed to the minutes, Lord Thurlow ap-
 ‘ pears to have said, that if the price was adequate, the dispute
 ‘ would be at an end.

‘ The principles of the English law upon this subject, as I under-
 ‘ stand them, are these : A trustee cannot buy from himself and
 ‘ his co-trustees alone, even fairly ; but he may buy from his *cestui*
 ‘ *que trust*, if he buy fairly ; however, as he may stand in a situa-
 ‘ tion of confidence, slighter circumstances may be evidence of
 ‘ fraud than in the case of a mere stranger, and fraud *proved*, will
 ‘ vitiate any bargain. But the case of a trustee is very different
 ‘ from that of a solicitor in a cause, as I have explained above ;
 ‘ and no such rule as is contended for against Mr Mackenzie, has
 ‘ ever been even urged, that I know of in this country ; as in Scot-
 ‘ land, many such purchases have unquestionably been made by and
 ‘ for solicitors, which have never been questioned, and where they
 ‘ have been questioned upon other grounds, as in the case of *Price*
 ‘ *v. Burgh*, and those grounds were not made out, they have been
 ‘ in effect established.’

The counsel for the defender in this country, will not presume
 to add any thing upon English cases, to what has been above sta-
 ted, but he will subjoin the conclusion of the Lord Chancellor’s
 speech in the case of *Fox v. Mackreth*, leaving the application to
 your Lordships. ‘ After conversing with his Honour and near
 ‘ half the Judges, a doubtfulness and difference of opinion has
 ‘ arisen as to the policy of laying down the rule, either of law
 ‘ or evidence, to the extent now contended for. I own I hesitate
 ‘ to lay down any such rule upon the subject. It is of no use to
 ‘ lay down the rule of law, if the rule of evidence is left indefi-
 ‘ nite. Two ways have struck me ; one, to let this matter go to
 ‘ a further enquiry ; the other, to which I have been more in-
 ‘ clined, to have it reheard, with the assistance of those who will
 ‘ furnish me with the means of laying down the rule which may
 ‘ set men at ease for their property, that when they observe a
 ‘ transaction for the sale of an estate cut down for inadequacy of
 ‘ value, after it has been affirmed by conveyances, and *acquiesced*
 ‘ *in for three years and a half*, I may know how I can state such
 ‘ a case as mankind shall understand, without putting them in
 ‘ fear with respect to the regulation of their property.’

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A P P E N D I X.

REPORTS of ENGLISH CASES mentioned in the preceding Minute.

WHELPDALE *versus* COOKSON, Easter Term, 1747.

On devise of lands in trust for payment of debts, the trustee himself purchases part.

LORD CHANCELLOR said, He would not allow it to stand good, Vezey, Vol. 1. although another person, being the best bidder, bought it for him P. 9. at a public sale; for he knew the dangerous consequence: Nor is it enough for the trustee to say, You cannot prove any fraud, as it is in his own power to conceal it; but if the majority of the creditors agreed to allow it, he should not be afraid of making the precedent.

BOVEY *versus* SMITH.

A trustee having sold the land to a stranger that had no notice Vernon, Vol. 1. of the trust, and a fine with proclamations, and five years passed, No. 58. the trustee afterwards, for valuable consideration really paid, purchases these lands again of the vendee. And it was decreed by the Lord Chancellor, with the concurring opinion of the Lord Chief-Justice North, That the trustee, notwithstanding the fine, proclamations, and non-claim for five years, should stand seised in trust, as at first, as if the land had never been sold, nor any fine levied.

a

BOVEY

BOVEY *versus* SMITH.

Vernon, Vol. 1.
No. 139.

The case was, Mrs Bovey, the plaintiff's mother, living in Holland, and though a feme covert, yet traded as a feme sole; and having acquired to herself a separate estate about 40 years since, made her will in *Dutch*, and thereby devised her houses in *Gbelfea*, which she had purchased, *with her capital*, to *William Bovey*, her husband's son by a former venter, and two other trustees, and their heirs in trust, *for her four daughters and their children, and such of their children as should be alive at the last*; and afterwards, by her said will, declares the trust of all her estate thereby undisposed of, to be for her and her heirs. The plaintiff claims as heir to his mother, his elder brother not being of the whole blood, but by a former venter.

Before the making of this will, Mrs Bovey had settled these houses by deed executed in her lifetime on the same trustees, in trust, for such persons, and such estate, as she, by any writing under her hand and seal, should direct and appoint.

William Bovey, and the other trustees, apprehending that this devise carried the inheritance of these houses to the daughters, in 1652, sell the inheritance thereof for a full and valuable consideration: And the money is proportionally distributed amongst the daughters, the plaintiff being privy to the conveyance, and making no claim, or pretending any right to these houses, and a fine is levied of them, and five years pass. Afterwards, differences arising betwixt the plaintiff and *William Bovey*, the trustee, there is an award made, and L. 200 awarded to be paid the plaintiff, and the plaintiff to give a general release of all actions, real and personal; but no notice is taken in the award of the breach of trust. The L. 200 is paid the plaintiff, and a general release given accordingly.

About ten years afterwards, *William Bovey*, the trustee, for a full consideration, purchases back these houses to himself and his heirs, and the defendant, *Smith*, standing in the place of Bovey, the trustee, and the plaintiff having now taken advice upon this will, and conceiving the daughters took only an estate for life, exhibits his bill, to have an execution of this trust, and these lands decreed to him. The late Lord Chancellor had twice heard this cause, and decreed it both times for the plaintiff; but the decree not being signed and inrolled, the cause came this day to be reheard,

reheard, before the Lord Keeper. For the defendant it was insisted, That this was not only a very old and stale demand, (the pretended breach of trust having been committed above thirty years since), but a very hard demand in equity, to charge a trustee, who, according to the best of his skill, had in this case acted honestly; and to evict the land from him, who was now become a real and innocent purchaser thereof.

And *first*, As to the will itself, it was observed, that the same was made in *Dutch*, and the original was lost, and a small mistake in the translation might make a great variance in it; for if it had been *issue* instead of *children*, it would have carried an estate tail; and the custom in *Holland* may be, that those words carry an inheritance there. And the will being in truth incoherent, and almost insensible in itself, if the matter had been called in question within any reasonable time, the intent of the testator might have been made out by proof, which might have given light to the doubtful and ambiguous wording of the will, and by which the intent of the testatrix might have better appeared. But here has been an acquiescence in the plaintiff, for above *thirty* years: Whereas, had he soon laid claim to this estate, the defendant might in equity have compelled the daughters to have refunded the money received by them out of this estate.

Secondly, It was insisted, that the fine, with proclamations, and *non-claim* for five years, was a flat bar to the plaintiff in this case; and cited cases wherein it had been resolved, that no other claim than the exhibiting a bill, and taking out a *subpœna*, was a sufficient claim in equity; as a man at law, must file an original where he cannot enter.

Thirdly, That the release being general of all actions real and personal, it released the breach of trust, if any were; and it being full within the words of the release; after so many years, it ought not now to be inquired into, whether this breach of trust was intended to have been released thereby.

Fourthly, If there was any notice of the trust in this case, it was at most but a notional notice, for both the plaintiff and the trustee apprehended that this will carried the inheritance to the daughters.

Fifthly, It was observed, that this was a declaration of a trust only, and not the limitation of an estate, and that therefore, there was a greater latitude left to the Court in judging upon this case, and that in many respects it ought to have an equitable and favourable construction.

For

For the plaintiff, it was answered, That though the will was in *Dutch*, and though it might be such as, by the law of the *Low Countries*, would carry an inheritance, (though what the custom of the *Low Countries* is does not appear), yet that is nothing to the purpose; for a will, to pass the inheritance of lands in England, wheresoever it is made, must be such as will carry an inheritance according to the laws of this realm, as has been resolved in case of *Latin wills*, and the like; and the devise being concerning lands, the whole will must be in writing, and the intent of the testator cannot be supplied by proof; and as to the plaintiff's acquiescence under this breach of trust, it is easily answered, for the last of the daughters died not above two years before the bill exhibited; and though the remainder man may, if he will, take advantage of the forfeiture of the tenant for life presently, yet he is not bound to do it, but shall have five years after the death of the tenant for life to make his entry or claim; and the plaintiff's bill in this case, is very proper to have the land itself decreed; for though the plaintiff may have satisfaction in damages, yet the land being now come to the trustee again, the best and equalest measure, is to decree him to convey the land itself; and they cited the Lord *Canmore's* case, where a trust was broken, and then a full bar to the *cestui que* trust, and yet the land coming afterwards into the trustee's hands, he was decreed to convey the land itself, as the best measure that could be taken in that case. And the plaintiff's counsel did insist, that there was not any bar at all to the trust, as this case was; for *first*, As to the release, a release shall never bar a man, who is ignorant of the right and interest he is to release, and where such right is suppressed and concealed from him; and in this case, the plaintiff was not apprised that any thing passed to him by this will.

Secondly, Though the release be general of all actions real and personal, yet it was made in pursuance of an award, which concerned matters in account between the *cestui que* trust, and the trustee only; and it is not, nor can be pretended, in this case, that the plaintiff had received any satisfaction for his interest in these houses.

Thirdly, All the three trustees joined in the conveyance, and so were all guilty of a breach of trust; and yet this release is made to one of them only; whereas, if it had been designed to have released

released the breach of trust, it would have been made to them all.

Then, as to the fine, it is true, a fine will bar an equitable right, as well as an estate at law, but then the estate must be displaced, which here it is not, the fine being by and between the parties to the trust only, who, having notice of the trust, the fine operates so, as to strengthen the trust, and not to extinguish it. The trust being all along incumbent on the land, and passing with it; and so this case is in truth stronger than that case of the Lord *Canmore*, for here was never any real bar; and in this case it was impossible any one should come at the land, but they must have notice of the trust; for they purchase under the will, and all their title is by the will, by which the trust is created; and a man that has notice of the will, must at his peril take notice of the operation and construction of the law upon it; and though this be called a notional notice, yet it is such a notice as has always been allowed to be good; for every man is presumed to be conversant of the law of the realm, and he shall not take advantage of his own ignorance, but *caveat emptor*.

For the defendant it was only replied, That here was no answer given as to the plaintiff's acquiescence, and coming so late, for there was no survivorship in the case; for the jointure was severed by the fine, and all but one of the four daughters dead almost ten years before the bill.

The Lord Keeper in the debate, put this case to *Serjeant Maynard*: A seised in fee in trust for B, for full consideration, conveys to C, the purchaser having notice of the trust, and afterwards C, to strengthen his own estate, levies a fine, Whether B the *cestui que* trust be not in that case bound to enter within *five* years? And the counsel were all of opinion that he was not; for here C having purchased with notice, notwithstanding any consideration paid by him, is but a trustee for B; and so the estate not being displaced, the fine cannot bar.

Lord Keeper. In this case you come here in equity, after one and thirty years possession, to affect an estate with a trust, notwithstanding a release and fine; and that upon a supposal, that Mrs *Bovey* made no other appointment (as she had power to do by the deed), and after so long a possession, it ought rather to be presumed she did, and also upon a supposal that this is a true copy of the will. This is only a translation, and the original lost, and the difference in point of translation

translation betwixt children and issue is nice ; and the question is, Who shall suffer? for the defendant is a purchaser, and has paid a full consideration, and here must be affected with a notional notice only, and the plaintiff all the while stood by and was silent, and at best was passive in the breach of trust ; and this case is rather stronger than Sir George Norton's case, where the heir stands by and encourages a purchaser, and afterwards trumps up a deed of entail. ' Though it be hard to dismiss the bill after two decrees for the plaintiffs, yet I am not satisfied I can decree it for him.

The bill must stand dismissed.

TWINING against MORICE, and others.
TAGGART against TWINING and others.

Brown, Vol. 2.
p. 326.

James Whitchurch, Esq; being seised of a copyhold estate, consisting of a mansion, called *Yark-house*, and lands situate at Twickenham Com. Middlesex, held of the manor of *Isleworth Sion*, (except a small part which lay in the manor of Twickenham), and having surrendered them to the uses of his will, made his will, dated the 21st of December 1782, and afterwards a codicil, dated 1st March 1785, and thereby devised the premises to the defendants Morice, Taggart and Addison, in trust, to sell the same, and to apply the money arising from the sale as therein directed, under which the defendant Taggart was beneficially interested, and appointed them executors. The testator died in February 1786, and the executors being desirous of selling the estates, in pursuance of the directions of the will, employed Messrs Skinner and Company as the auctioneers, who advertised the same for sale, and especially lot one, which was the mansion-house, was in the conditions of sale described as copyhold of inheritance, held of the manor of Sion at a small quit-rent and fine certain, *which renders it equal in value to freehold*.

Previous to the sale, it was agreed among the venders, that the first lot should not be sold for less than L. 2000 ; and if that should be sold for that price, the others should go for what they could fetch. Mr Blake, who was concerned as solicitor for the sellers, was present at that meeting, and knew what was settled with respect to the price, but was not employed by the vendors to bid

bid for them, but other persons were employed for that purpose. Afterwards, at the place of sale, the plaintiff Mr Twining seeing Mr Blake, held some conversation with him, and desired him to bid for the estate for him, (Mr Twining). The lots were put up to sale, and Mr Blake bid L. 1500 for lot *one*, and afterwards, in consequence of one of the vendor's bidders bidding against him, he bid L. 2000, at which price the lot was knocked down to him; and he afterwards bid for lot *two* L. 170, and for lot *three* L. 280, at which prices these lots were also knocked down to him, and he paid the deposit according to the conditions of sale. No person bid at the sale but Mr Blake and the bidders for the venders.

After the sale, the defendant Addison, one of the executors, found among the testator's papers deeds and writings, by which it was discovered, that the mansion called *York-house*, and the lands thereto belonging, which were the principal part of the estates sold, were freehold, and particularly the conveyance thereof to the testator as such, by lease and release of 15th and 16th July 1746; and that only a small part was copyhold, held of the manor of Sion. Upon which the defendant Taggart wrote to Mr Blake, as attorney for Mr Twining, desiring Mr Twining would relinquish his purchase, on two grounds: 1st, That the defendants had been deceived by Mr Blake, whom they considered as their agent bidding for Mr Twining; 2^{dly}, That the estates had been sold under a mistake as to their tenure: And upon Mr Twining's declining to relinquish the purchase, the defendant Taggart refused to execute conveyances of the premises; upon which the plaintiff filed the present bill for a specific performance.

The defendants Taggart and Addison, by their answers, swore, that at the time of the sale, they believed that Mr Blake was bidding for the venders, and Taggart filed a cross bill against Twining and Blake, stating the same thing, and praying, that the biddings might be set aside as fraudulent and void against him; or if the Court should be of opinion, that the biddings were fairly made by Blake on behalf of Twining, that Blake might answer to him (Taggart) for the difference between the sums of money at which the premises were knocked down to him at the sale, and their real value at the time, and an account or issue directed for that purpose.

Mr Twining, by his answer to the cross bill, stated his meeting with Blake as accidental; and that, not chusing to bid himself, he desired him to bid for him; and that Blake actually did so;

so; and that he knew nothing of Blake's acting as attorney for the vendors.

Mr Blake, by his answer to the cross bill, stated, that he bid for Mr Twining, and not as agent of the vendors.

The defendants read evidence to prove, that Blake was considered at the sale as the agent of the vendors: Particularly Thomas Southcombe, who swore, that he did not believe that the persons present considered the estates as sold, but that they had been bought in by the defendant Blake on behalf of the vendors, and that he attended as attorney for them; and George Adney, who swore to the same effect, and that he believed, that the bidding of the defendant Blake was prejudicial to the sale, for that Southcombe had informed him he would have bid a larger sum at the sale, if he had believed that the defendant Blake had bid for himself, or for any other person save the vendors.

Mr Scot and Mr Finch, for the plaintiff Twining, argued, that in this case Mr Blake was the only real bidder, the bidding for the vendors being illegal: *Bexwell v. Christie, Cowp. 395.* a vendor cannot bid at the sale of his own goods, or order the auctioneer not to sell under a certain price. And the acts of Parliament, exempting goods bought in for the vendors from the duty, have not made the practice legal, as they may apply to a method which is legal, as putting up the goods at a certain price. Here Blake was a fair bidder for Twining. Though he had been the agent of the vendors, he was not employed to bid for them. With respect to the value, the surveyors employed for the vendors swear, that it was sold for its full value.

Mr Mansfield, Mr Hardinge and Mr Mitford, for the defendants: The sale ought not to be carried into execution having passed under a mistake, all parties thinking it to be copyhold, and it turns out to be freehold. Wherever a man is drawn, by accident or mistake, into a bargain, this Court will stand neuter, and leave the party to go to law. The only person who could form a judgment on the subject was Blake, who has made himself the agent for the buyer. It is impossible to say there is not a difference of value, though copyholds, held of the manor of Sion, are nearly, they cannot be wholly, of the value of freehold; there is always a difference, as the Lord would expect a sum of money to enfranchise. If it had been sold as freehold and turned out to be copyhold, the contract could not be enforced, *Hick. v. Philips, Pr. cb. 575*; then it should be the same in this case. *2do*, The contract should be set aside also on account of the situation

tion of Blake who, from agent for the seller, is become the agent of the buyer. It is the same as if he had bid for himself. Mr Twining can be in no better situation than Blake himself would have been. If he, going to the sale as agent for the seller, had bid for himself, and had come to this Court for a performance of the contract, the Court would not decree it. The agent or trustee of the seller, cannot become the buyer, *Whelpdale v. Cookson*, 1 *Vesey* 9. then every thing affecting him must affect Mr Twining; and the sale, if not valid to Blake, will not be so as to him. Blake appeared at the sale as the agent of the vendor; every body present thought him so; Taggart looked upon him as his agent, and when he bid, conceived he bid for him. Taggart had no intention to sell to Blake or to Twining. Wherever a man has got an estate by misrepresentation, this Court refuses to give assistance, *Philips and D. of Bucks.* 1 *Vern.* 227. Then, 3dly, With respect to the relief prayed against Blake: It is true, there is no case in which such a relief has been given against a solicitor, but in *Arnot v. Biscoe*, 1 *Vesey* 95. the Court thought it had a jurisdiction for that purpose. And in *Dashwood v. Fendon*, in 1748, the cause stood over to enquire, whether the parties stood in any other character than as agents. If a person, having notice of an incumbrance, sells to one having no notice, who sells to another, though this vendee has no remedy against his vendor, yet he has against the first seller, *Ferrars v. Cherry*, 2 *Vern.* 384.

Mr Madocks and Mr Stratford for Blake. There was no fraud on the part of Blake, nor any corrupt motives to benefit Twining in the purchase; his bidding for him was accidental; and he was at liberty so to do, not being employed to keep up the price. If the defendant has any remedy, it must be at law; this Court will not interfere in cases where an action will lie.

The defendant's offering to read the evidence of Addison, one of the defendants, Mr Scott opposed it, on the ground, that he was a defendant, subject to payment of costs, and therefore incompetent.

Mr Mitford argued, That this was not sufficient to render his evidence incompetent, and cited a case of *Downing v. Townshend* in 1753, where Sir George Downing wrote a note, and delivered it to Mrs Townshend, by which he gave to Mrs Townshend whatever monies she might have of his in her hands at the time of his decease, for the use of her daughter. On a bill filed, claiming certain sums of money which Mrs Townshend claimed to hold in trust for the daughter, it was a question at the hear-

ing, Whether Mrs Townshend's evidence should be read, as she was a defendant; and if her holding the money should be held fraudulent, would be liable to costs? Lord Hardwicke ordered the evidence to be read; though he said, he saw the importance of the question to families, and that Courts would admit of such evidence with great caution; yet, as she had no direct interest, her evidence was competent.

But his Honour thought it was impossible to say the defendant, when examined, was not in a situation to be swayed. He was a trustee, on whom Twining was calling for a specific performance of a contract; he therefore thought his evidence could not be read.

Master of the Rolls.—These are two bills, the first filed by Mr Twining for a specific performance of the contract for the sale. The second by Mr Taggart, impeaching the sale, and praying that it may be set aside; or if not so, praying a remedy against Mr Blake. The principal question on the first bill, is with respect to the specific performance, and it is admitted on all hands, that it is not every contract which is entered into, that a Court of Equity will carry into execution. Several points have been made, whether this is such a contract as should be carried into execution. The first is with respect to value; but I think the evidence is not conclusive on that subject; it is not such as to assist the vendor a great deal as to the transaction. Neither do I think any blame is to be imputed to Mr Blake. With respect to the intelligence communicated to Skinner, I think that would not afford a ground for successfully resisting the specific performance; the estate seems pretty nearly equal in value, whether it be freehold or copyhold. Perhaps in the converse, if represented as freehold, and turning out copyhold, it might not hold, because the party buying might particularly wish for a freehold estate; but, on the vendor's side, it does not hold, *nil operatur*. The ground I shall go upon leaves the character of all parties unimpeached. The sale intended was a sale by auction, where every one who would might bid: If any thing therefore happened, that would cast a damp upon the sale, it must be hurtful to the vendor. With respect to bidders being employed for the vendors, I do not say, the doctrine in *Bexwell v. Christie*, is wrong, but every body knows that such persons are constantly employed. It is said, if those persons were known, it would be inconvenient and detrimental, because it would deter fair bidders: But if it was the idea of the persons

persons present at this sale, that Mr Blake was such a bidder, it was detrimental to the vendor. Here he was known to be the agent of the vendor. He began early as a bidder, and in fact was the only real bidder. It is likely that he should be thought, by the persons present, to bid for the vendor; and if I believe the witnesses, I must believe that it did chill the sale. Into this situation he was brought by the conference with Mr Twining: The fair consequence is, that the sale did not proceed with so much advantage as it otherwise would have done. Mr Scott said, If I thought the persons in the room thought him a puffer, it was thinking him what the law would not allow him to be; I cannot say I think so, as they knew the practice to be to employ such persons. By an inadvertant act, Mr Blake was in a situation which hurt the sale, and was put into that situation by Mr Twining. It is therefore not such a case that I can decree a specific performance, I will not set the contract aside, but will leave the plaintiff to his remedy at law.

Both bills dismissed.

Crowe against Ballard.

The late Lord *Litchfield*, by his will made in the year 1774, Brown, Vol. 3: gave to the plaintiff *Robert Crowe*, a legacy of L. 1000, to be paid P. 117. him at the death of Lady *Litchfield*. Lord *Litchfield* died in the year 1776, leaving Lady *Litchfield* his widow, aged 69 years or thereabout. The plaintiff *Robert Crowe*, being then a young man about 22 years of age, and having pressing occasions for money, the defendant undertook, as his agent, to sell the legacy to the best advantage, and informed the plaintiff, that he had endeavoured to sell the same, but could get no offer higher than L. 300, for which he had sold the legacy to Mr *Toft*, to whom the plaintiff, on the defendant's representation, executed an assignment. In fact, *Toft* was only a nominal purchaser, and the defendant really purchased the legacy. The money was paid by small sums, betwixt 1st October 1777, and the 23d February 1778, to the plaintiff *Robert*, his brother, the other plaintiff *George*, and to Mr *Seally*, the plaintiff *George's* tutor, viz. L. 30 to *George Crowe*, L. 100 to *Robert Crowe*, L. 20 to *George Crowe*, L. 50 in satisfaction of a draught of *Robert*, and to Mr *Seally* at different times L. 60, L. 10, and L. 49, 10s. which

which last payment however, was contradicted by him in his evidence. Afterwards, in 1780, Lady *Litchfield* being likely to die, and the plaintiff fearing his sale of the legacy would come to the knowledge of his father, he applied to the defendant, and requested him to apply to *Toft*; to know what sum, payable at the death of his father, *George Crowe senior*, he would take for his interest in the legacy; when the defendant told him, that *Toft* had quitted the kingdom, or was dead; and that his interest in the legacy had become the property of himself, the defendant, and pretending great friendship to the plaintiff, at length agreed to give up his right to the legacy, upon receiving the joint security of the plaintiffs *Robert and George Crowe*, for the sum of L. 1800, payable at the death of *George Crowe senior*, (who was then of the age of 63 years,) whereupon a *post obit* bond was entered into, and executed by the plaintiffs to the defendant, dated 25th April 1780, in the penal sum of L. 3600, with a condition under written, reciting, that the plaintiffs stood indebted to defendant in L. 900, conditioned for payment of L. 1800, in case they, or either of them, the plaintiffs, should survive the father, within three months after the father's death; but in fact, no such debt of L. 900 subsisted at the time. In *October* 1782 the plaintiff's father died, and the plaintiff *Robert* came into possession of a fortune of L. 3000 a-year, and in the month of *January* 1783, the defendant applied for payment of the bond, but the plaintiff's being unable to pay it, and defendant threatening a suit, a money bond was given for the L. 1800, and interest at 5 per cent. bearing date 10th *October* 1782, since when, the plaintiff *Robert* had paid four years interest on the bond, to the month of *October* 1786, and the defendant having sued out process to arrest the plaintiffs, they filed this bill, 18th *May* 1787, praying, that upon payment of the money really advanced, the defendant might be decreed to deliver up the bond to be cancelled, and might be restrained by injunction from proceeding at law, and therein charged, that the legacy at the time of the sale, was really worth, to a purchaser, L. 741 : 12 : 8, calculating the life of Lady *Litchfield* to be worth $6\frac{1}{2}$ years purchase, and allowing the purchaser 5 per cent. per annum, and compound interest for his money, therefore that the sum of L. 300, was L. 441 : 12 : 8 below the value.

Mr Solicitor General, Mr Lloyd and Mr King for the plaintiffs, stated the case, and the general value of the life, and the sums paid, to show the inadequacy of the price given for it; they also insisted on the general rules of relieving persons who treated in
this

this way for their expectations, and who were held by the Court entitled to its interference: That, here, the first transaction was manifestly fraudulent and unconscionable. *2dly*, That the money bond, though after the death of the father, could not be considered as a confirmation, that in order to be so, it should be done freely, and not under the influence of the prior transaction. For this they cited *Chesterfield v. Janßen*, 2 *Vezey*, 125; *Cole against Gibbons*, 3 *Wms.* 290, citing *Curven against Milner*, in the note on page 292. *Norris against Rodd*, 16th March 1779, where the plaintiff in consideration of L. 2000, sold to defendant an annuity of L. 435 for the life of plaintiff, payable upon the death of his father, (aged 71 years,) if plaintiff and defendant should survive him. In *October* in same year the father died, and upon the first payment becoming due, defendant applied for it, and plaintiff not being able to pay it, obtained from plaintiff a mortgage of his estate in possession and reversion, it being chiefly his mother's for life, for L. 4212, (L. 4000 being for the L. 2000 really advanced, and L. 212 for the half year's annuity due: In 1775), the plaintiff filed his bill, and was relieved against the grant, bonds and mortgage.

Mr *Mansfield* and Mr *Scaife* for the defendant argued, that from the secrecy necessary from the fear plaintiff had of his father's hearing of the plaintiff's design to sell the legacy, a larger price could not be obtained for it: That it had been offered to several persons, but no one had offered more. With respect to the value, the sums were calculated for certain interests, and with the contingency of the plaintiffs dying before their father. With respect to the confirmation; if the confirmation in this case does not prevail, there never can be a confirmation. In *Chesterfield v. Janßen*, the transaction was held to be affirmed, and the cases where it has not been so, have been cases of great distress; and where the distress has continued at the time of the confirmation. This was the case both in *Curven against Milner*, and in *Norris against Rodd*.

Lord *Chancellor*.—This case lies in a narrow compass. The plaintiff was a young man entitled to a legacy of L. 1000 upon the death of Lady *Litchfield*, who was 69 years of age. *Ballard* undertakes to sell the legacy, and pretends he took great pains so to do; but it is in evidence, that he represented it as a very hazardous business. Then he buys it himself. This is alone sufficient to set aside the transaction. It is impossible at any rate, that the person employed to sell can be permitted to buy. Even if this was done with the knowledge of the party selling, it could not be supported. That principle must prevail, even

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if he had bought fairly,—he paid the money as advanced by the person who had purchased. The whole according to his own answer, was L. 310, of this L. 49 is denied. It is as oppressive a transaction as can be conceived. Then the consideration of the *post-obit* bond;—then as to the subsequent bond being a confirmation, I am at a loss on what principle Courts have spoken of confirmations. If a gentleman of rank, fortune and honour, under age, in distress, or otherwise, gives a bond, and afterwards conceives that he has made a hard bargain, and knowing that the bond is bad, will give a new bond, that will maintain the possession of the right of the holder of the bond, and this act shall be said to be a confirmation, but not any act done under the influence of the former transaction, and the opinion that that bond is good.—Here the bond was not given freely, but under the influence of the former transaction. I do not remember the case cited by Mr *King*, (*Norris against Rodd*), but it must have proceeded on the same ground with this. The confirmation, from payment of interest, is of no avail, being still under the same impression. I am clearly of opinion the transaction must be set aside, and the bond delivered up; the Master must take an account of what is due between the parties, and the defendant must pay costs.



